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An ID database for post-referendum Scotland? A legal-contextual analysis.

To the surprise of many observers, the Scottish government announced in early 2015 plans for a Scottish National ID system, based on the existing health service database. The Scottish National Party (SNP), in power in Scotland since 2007, had previously strongly rejected similar plans for a national database for the whole of the UK due to privacy concerns. How can this change of policy be explained? This paper puts the discussion in a much wider historical context, tracing it back to the 2014 independence referendum and ultimately the “asymmetric constitution” of the UK that followed the Union of Parliaments in 1707. Asymmetric constitutions pose unique challenges for some aspects of data protection law, where age-old questions of political and cultural identity and the more technocratic project of an “e-identity” are ultimately inextricably intertwined. Also, much of it will turn out to be the fault of the Germans.

1 “Ye Hypocrites, are these your pranks”

In 2007, the Scottish National Party (SNP) won for the first time a majority in a Scottish parliamentary election. At that time, a Labour government in London was pursuing a national ID card project for the whole of the UK. The backbone of this scheme was going to be a centralised computer database, the National Identity Register (NIR).¹ Biometric information in the form of fingerprint scans was to be linked to the register. The physical embodiment envisaged three types of identity cards:

- ♦ The National Identity Card, lilac and salmon in colour, for British citizens only.
- ♦ The Identification Card, turquoise and green in colour for EU citizens living in the UK
- ♦ The Identity Card for Foreign Nationals, blue and pink for immigrants from non-EU/EEA countries

Refusal to register was to carry a fine, as was failure to alert the authorities that a card had been lost, or that details in the register had changed.

In 2009, the Scottish Government confirmed Scotland's opposition to ID cards in a letter from Minister for Community Safety Fergus Ewing to the UK Government:

“The Scottish Government continues to be completely opposed to the National Identity Scheme, and the Scottish Parliament recently supported a call for the UK Government to cancel its plans for the National Identity Scheme. [...] There is little tangible evidence to suggest ID cards will deliver any of the benefits Westminster claim: it is far from certain they will do anything to safeguard against crime and terrorism, and there are real concerns

that the cards and the identity database could increase the risk of fraud, not reduce it.”²

Opposition against this card scheme was widespread, and after Labour lost the 2010 national election, it was scrapped by the Conservative-LibDem coalition.

In December 2014, the Scottish SNP-led government, re-elected with a much increased majority in the 2011 Scottish elections, published a “minor” consultation on the “proposed amendments to the National Health Service Central Register (Scotland) Regulations 2006”. The proposal, if implemented, will transform the Scottish National Health Service Central Register (NHSR) into a full-scale population register accessible to over 120 organisations. It will create a unique and persistent identifier that facilitates data sharing across agencies, while at the same time increasing the reach of the database and also the type of information that it contains. According to several commentators, it will create what the SNP in Scotland and Westminster had opposed in 2009: a National ID database.³ Importantly, the Information Commissioner's Office warned that the proposal, which lacks a Privacy Impact Assessment, risked breaching data protection laws and privacy standards. It also echoed the concern that the “creeping use of such identifiers” would eventually lead to a national ID card, introduced in circumvention of the democratic process:

“If we are to have a national identity number this should be the subject of proper debate and be accompanied by suitable safeguards. It should not just happen by default.”⁴

The proposed changes in a nutshell:

At present, only the National Health Service (NHS) and some local authorities can access the NHSR for the purpose of identifying citizens. In the future, it will provide services to 120 organi-

¹ For a more detailed account see Beynon-Davies, Paul. The UK national identity card. *Journal of Information Technology Teaching Cases* 1, no. 1, 2011, pp. 12-21.

² <http://www.snp.org/media-centre/news/2009/feb/snp-confirm-scottish-id-card-opposition>

³ See e.g. <https://scotland.openrightsgroup.org/campaigns/stop-scottish-id-database/>; <http://www.politics.co.uk/comment-analysis/2015/02/10/comment-buried-in-a-minor-consultation-scotland-s-id-cards-p>.

⁴ <https://ico.org.uk/media/about-the-ico/consultation-responses/2015/1043385/ico-response-nhs-central-register-20150225.pdf>

sations, including police, prisons, universities and some publicly owned companies such as Glasgow Airport, Quality Meat Scotland and Scottish Canals, VisitScotland and the Bòrd na Gàidhlig.

At present, only around 30% of citizens have their addresses on the NHSCR. The aim is to increase this to 100%, partly by data sharing and matching between the register and its new users, partly by merging it with the Community Health Index Postcode (CHIP). At present, postcode data is only provided consensually, under the new system, this consensual model would shift towards mandatory registration.

The proposal states three general aims for the proposal:

1) to increase data quality

This would be at the expense of the consensus model which is a main reason for poor or incomplete data.

2) to extend the ability to access online services using Myaccount to a wider range of public services

The new extended system will act as e-identity provider for Myaccount, the online system for the delivery of public service in Scotland. National Records of Scotland, as administrators of the NHSCR will acquire a critical role as an identity provider.

3) to assist with the tracing of certain persons

Explicitly named are children at risk (e.g. children missing within the education system) and foreign individuals with outstanding debts with the NHS. No more specifics are given – one of the key complaints by the Information Commissioner's Office, since some of these functions are already covered elsewhere, and without further specification could result in tracing citizens who for good and legal reasons do not want to be found. Finally:

4) to enable the identification of Scottish tax payers to ensure the accurate allocation of tax receipts associated with the Scottish Rate of Income Tax to Scotland

To understand exactly what these changes to the NHSCR amount to and if the charge of hypocrisy is merited, we need first to understand what the NHSCR is – and for this, a historical analysis of the origins of the database and the discussion surrounding it will be needed.

2 “See the front o' battle lour!”

The NHSCR is an electronic database held and maintained by the National Records Office (NRO). It contains basic demographic details of everyone born or deceased in Scotland, or who was at some point registered with a General Medical Practitioner (GP) here. In modern times, its primary purpose is to facilitate the movement of medical patient records between Health Boards both within Scotland, and between Scotland and the rest of the UK. Its earlier history though gives us a rich case study in the problems of national ID systems.

The NHSCR grew out of a census held in the UK in 1939 as part of the effort to put the UK on war footing. An example of wartime emergency legislation, the National Registration Act 1939 paved the way to a national census (or “enumeration” as it was called in law). As part of the census, every person received a unique “civil registration number” (based on their address on enumeration night, and later on the birth register). This prepared the ground for issuing the National Identity Card, issuing food ration books, and identifying eligible adults for conscription.⁵ It

also was used to identify children for evacuation purposes, which made the address an essential part of the information. Other data collected were names, gender, age, occupation, marital status and membership in the armed forces.

Most of these purposes became obsolete after the war had ended, though rationing continued for a few years. Introduced as emergency legislation with a sunset clause, the law that had enabled the census nonetheless proved remarkably difficult to get rid of. In 1946, Parliament passed the first of what would become a series of “Emergency Laws (Transitional Provisions) Acts”, which perpetuated several wartime laws, before becoming ultimately repealed in the 1956 Emergency Laws (Repeal) Act. The universally unpopular ID card system did not survive quite as long. It had been a controversial piece of legislation even under the tense conditions of 1939. The speeches of two Members of Parliament (MPs) at the time are particularly insightful. The Labour MP for the constituency of Farnworth, Georg Tomlinson, who had been elected in a by election just the previous year, said:

“It may be that there is a necessity for compiling a register, but here you have the possibility of people being stopped and asked whether they have or have not lost their cards. You may challenge a dozen people and you find one who has committed an offence. It will not help a scrap to win the war, but there is the possibility of penalising somebody who is perfectly innocent because we have passed a law for another purpose entirely”⁶

Here we find two ideas that had a lasting impact. First, Tomlinson anticipated what would later become, under Data Protection law, the purpose specification principle, but also anticipating that once data was collected, “mission creep” was all but inevitable. Second, we find a separation between the legal requirement to carry a physical Identity Card and the database that underpins such a card. It is only the former, not the latter that is seen problematic. This attitude would remain a defining feature of public debate on identity cards and identity registers up to the present day. Back in 1939, John Tinker MP expressed the concerns thus:

“We do not want to be stopped in the street by any person anywhere and to be forced to produce a card. If that kind of thing begins, we shall be afraid of people meeting us and asking for our cards. One thing that we do respect in this country is our freedom from being challenged on every occasion to produce something to prove that we are certain persons”⁷

The requirement to carry a physical ID card became subject of a criminal trial in 1950, when Clarence Henry Willcock became the last person in the UK to be prosecuted under the wartime act. He had been challenged by a police constable of the name Harold Muckle to present his identity card at a police station within 48 hours. Willcock refused as a matter of principle, saying: “I am a Liberal and I am against this sort of thing”. During his subsequent trial, he argued that as the stated purpose of ID cards had lapsed with the end of the war, citizens were under no obligation to produce them. This was to no avail, and he was convicted and charged the princely sum of 10 shillings, approximately £ 11 in today's money.

In *Willcock v Muckle* [1951] 2 ALL ER 367, the Court of Appeal upheld the conviction, but Lord Goddard, the then Lord Chief

account” see Vivian, Sylvanus. History of national registration. London: Cabinet Office Historical Branch, 1951.

⁶ <http://hansard.millbanksystems.com/commons/1939/sep/05/national-registration-bill>

⁷ <http://hansard.millbanksystems.com/commons/1939/sep/05/national-registration-bill>

⁵ See <http://www.nrscotland.gov.uk/statistics-and-data/nhs-central-register/about-the-register/the-history-of-the-register> for an authoritative “participant

Justice of England and Wales, showed strong sympathy for the defence:

"This Act was passed for security purposes, and not for the purposes for which, apparently, it is now sought to be used. To use Acts of Parliament, passed for particular purposes during war, in times when the war is past, except that technically a state of war exists, tends to turn law-abiding subjects into lawbreakers, which is a most undesirable state of affairs."

Here too we find the fear of mission creep, but also again the focus on police powers and their right to demand identification from citizens.⁸ We also note in passing that despite strong objections, the courts were unable to invalidate the law. This too is a feature of the UK constitutional settlement, with a strong emphasis on parliamentary sovereignty and a correspondingly weak(er) control by the courts which can not normally invalidate primary legislation.

When the Labour Government of Attlee was defeated in the general election of 1951, the new Conservative government under Winston Churchill abolished the law in 1952, to great support from the general public but against the expressed wishes of police and security services. Ever since, political opposition to ID cards in the UK tends to emphasise that the very concept is an alien, foreign idea, something typical for the French or German "administrative" state, and thus not "properly British".⁹ Not having a British Identity card thus became part of British identity.

3 "Be blest with health, and peace, and sweet content!"

While 1951 saw the end of national ID cards, the database or register that underpinned them stayed in existence. Governments rarely give up information about citizens once collected, and soon a new use for the census data emerged.

From the 19th century onwards, the state had taken on a more and more active role in providing public health care throughout Europe. During the interwar years, it had become clear however that the UK was significantly lagging behind continental Europe and the US, as measured in international league tables. William Alexander Robson, one of the most influential academic commentators during that time, decried the "multiplication of health authorities and the disintegration of function", and was in particular concerned about the "failure to envisage the health of the community at different ages and different stages".¹⁰ In 1942, this insight became one of the three core principles of what was to become the National Health Service, when Beveridge's famous report on "Social Insurance and Allied Services" envisioned a welfare state that provided "from cradle to grave".¹¹ Of course, any hope to address Robson's concern would be facilitated, in due time, by having a single identifier for health service providers that allows to track individuals through their ages and stages in life.

⁸ See also Joinson, A. N., Paine, C., Buchanan, T., and Reips, U. Watching me, watching you: privacy attitudes and reactions to identity card implementation scenarios in the United Kingdom. *Journal of Information Science*, 2006, vol. 32(4), pp. 334-343.

⁹ Agar, Jon. Modern horrors: British identity and identity cards. In: Caplan, Jane, Torpey, John (eds.). *Documenting individual identity: the development of state practices in the modern world 1*, 2001, pp. 101-120, p. 102.

¹⁰ Robson, William Alexander. *The development of local government*. Allen & Unwin, 1937, p. 333.

¹¹ Abel-Smith, Brian. *The Beveridge report: Its origins and outcomes*. *International Social Security Review*, 1992, 45#1-2 pp. 5-1.

Keeping track of an individual over time was only one of the requirements that were to come with a National Health Service. As important was the need to track individuals through space. Health provisions in both England and Scotland at the time were blighted by a chaotic and highly fragmented system of service provision and governance. A particular problem was the co-existence of a private and a public hospital system, which, in the words of Bertrand Dawson, author of the influential Dawson report in 1920, resulted in "duplicating and even conflicting, without machinery in existence for coordinating their activities".¹² In South Wales alone, 93 public hospitals were "governed" by 46 local authorities. Thrown into the mix were a further 48 voluntary hospitals that operated totally independently of each other and any state control.¹³ Local resistance of these independent bodies against any form of more streamlined administration was fierce, and, supported by the medical associations, successful in preventing any reform in the interwar years. This chaotic state of affair was however unable to cope with the demands the war made on Britain, especially once civilian casualties were mounting as the result of the air raids. An Emergency Medical Service was put in place, centrally controlled and with significant new infrastructure investment. As contemporary observers noted: "the bombing plane, by transforming the nature of warfare, has forced on us a transformation of our medical services". Or as Charles Webster put it more acerbically in modern days: "The Luftwaffe achieved in months what had defeated politicians and planners for at least two decades".¹⁴

In 1941, the Government announced a proposal for a comprehensive hospital service, which however had a significant degree of "localism", putting local authorities in charge of providing it. The Beveridge Report of December 1942 recommended in 1942 a National Health Service with general practitioners who would work through regional health centres and hospitals. A 1944 "White Paper" finally included the founding principles of the NHS as a nationalised health provider:

- ♦ All services are to be provided free at the point of use and financed through general taxation.
- ♦ Everyone, independent of income, nationality, or age is eligible for care.

The last point is of particular importance for our discussion. It meant that questions of (national) identity were less relevant for the new system than one might have thought. It had from its inception a duty to also provide services for foreigners temporarily visiting the UK (undoubtedly also necessitated by the large scale displacement of people during the war), who were not taxpayers and hence also not part of a prior registration or identification system.

When after the war Clement Attlee's Labour Party government tasked Aneurin Bevan with implementing these ideas, he decided that "the only thing to do was to create an entirely new hospital service, to take over the voluntary hospitals, and to take over the local government hospitals and to organise them as a single hospital service". The result however still showed that it was based on a compromise between groups favouring a highly decentralised and regionalised approach, and those favouring a stronger role for a centralised administration. One consequence of this compromise was to keep the health systems of Scotland and England separate

¹² Speeches by Lord Dawson of Penn, *The Times*, 19 Oct 1937.

¹³ Webster, Charles. *The national health service: A political history*. Oxford University Press, 2002, p. 5.

¹⁴ Webster, 2002, p. 6.

entities, with entirely different lines of command and responsibility, and different funding streams. The NHS in England and Wales was established by the National Health Service Act 1946, which received Royal Assent on 6 November 1946. NHS Scotland was created by the National Health Service (Scotland) Act 1947.

The balance between centralism and regionalism was achieved by a “tripartite” system: Firstly, the hospital sector became nationalised, with (in England) 14 Regional Hospital Boards with overall responsibility to coordinate health services, and below them 400 Hospital Management Committees responsible for the administration of hospitals.

Secondly, local authorities took on many of the roles the old “Poor laws” had assigned to parish councils, including vaccination programs, health education and midwife services.

Thirdly, the main responsibility for primary care was to lie with general practitioners (GP) who remained semi-independent, paid for each person on their list. As points of first contact, they also created the health records of their patients. Because payment was by number of people recorded on their lists, creation of administrative records that identified individual patients became part and parcel of their role. Since, as we discussed above, people are entitled to NHS treatment independent of their nationality or place of residence, these patient registers included people who would not be part of any other governmental register or data set.

This set-up immediately created an obvious problem. As an increasingly mobile workforce moved between Health Boards, or indeed between Scotland and England, they would end up on several lists, one for each GP whose services they used. This proliferation of lists made reliable payment to GPs impossible, and also made it difficult to ensure that the current GP got access to the health records of his patients. A method needed to be found to track an individual across different care providers – and the census data provided just that information. As it had recorded people irrespectively of their nationality or employment status, it matched the requirement of a health service free for everybody. Because it was the result of a central effort, it avoided duplication of IDs. So while the national ID cards were discarded, the census data that underpinned them found a new use as a central enabler of the modern welfare state and formed the core of the National Health Service Central Register.

4 “Then gently scan your brother man”

Maintaining the NHSCR became one of the functions of the General Register Office for Scotland (GROS), already charged since 1854 with recording all births and deaths in Scotland. With that data, the aim of the modern welfare state and the NHS in particular, to provide services from cradle to grave, could be supported administratively. In 2011, GROS and the National Archives of Scotland (NAS) merged to form the National Records of Scotland (NRS), which is the body now charged with maintaining the NHSCR.

Crucially, the NHSCR does not contain patient’s health records (with the exception of certain types of cancer patients for research purposes). It enables however the location of a health record wherever it is held. At this point, we can see why the Scottish SNP can argue that its proposal is nothing like the UK database it had rejected in 2009: NHSCR is not (just) a national database, rather, it is a register of all customers of the NHS, domestic and foreign.

It is also not linked to a physical card, let alone one mandatory to carry – the main focus of opposition to national ID systems in the UK as we have seen.

However, while the NHS was the historical corner stone of the modern welfare state in the UK, it provides of course only one important element of it. A whole range of services and benefits are provided today, many administered locally and facing similar problems as those experienced by the young NHS. In Scotland for instance, pensioners are entitled to free bus passes. But since many bus companies are run by local councils, a way had to be found to identify pensioners and their entitlement across municipal boundaries.

It is therefore maybe surprising that it took until 2004 before politicians realised that the NHSCR could also support these types of “public service delivery”. That year, NRS was asked to provide the unique reference number created for NHS customers also to the equivalent index of customers of Scottish local authorities. To pre-empt concerns, only data of people who had specifically asked to be included in the local authority database were added. This new and widened remit of NHSCR soon became linked to the National Entitlement Card – a multi-application smartcard that according to the local councils that promote it is

- ♦ quick to use – just flash it over a reader and it scans automatically;
- ♦ convenient – a single card with many uses helping you to reduce the number of cards you need to carry.¹⁵

Depending on the local council, the card can be used e.g. as library card, for cashless catering within schools, taxi travel for disabled people, or as proof of age for pupils.

Here we can see why the critics of the new scheme claim it is an ID system in all but name: by combining a mandatory but card-free registration system whose purpose was initially national defence and that became central for national health, with a carded but not mandatory system, the resulting database does create a de facto mandatory, universal and nation-wide ID and ID card system.

An additional layer of complexity was added when the Scottish government introduced as part of its “Digital Future agenda” the “Myaccount” facility, soft-launched in Edinburgh in 2014. Myaccount is the digital equivalent to the Entitlement Card – a single online account that allows registered users to access government services. Participation is (so far) voluntary and all services remain available offline. As more and more government services are moved online, not just in Scotland but throughout the Western world, this is not an unusual development. An e-identity is a necessary precondition for such a system, and both on the level of the UK (and by implication England) and on the Scottish level, steps are taken to create one. However, the ways how such an e-identity should work differ in interesting ways. For the UK, the Cabinet Office in London envisions a federated system where private sector providers will become accredited e-identity providers. In Scotland, this role will be taken on by the government through NHSCR. This is not just a minor technical detail, it reflects a deep and systematic difference in political culture between these two constituent parts of the UK, and is an explicit policy decision:

“The Scottish Government considers that the people of Scotland will prefer a public sector, not-for-profit body to be responsible for

¹⁵ <http://www.entitlementcard.org.uk/index.php?pid=2>

“Myaccount”. This contrasts with the UK Government’s approach of individuals setting up an account with a private sector body.”¹⁶

In the international discussion on privacy, the US approach with its trust in companies is often contrasted with the European trust in governments. Within the microcosmos of the UK, we find the same juxtaposition. Post-war Scotland tended to return governments that were to the left of the UK-wide majority, England, especially southern England, favoured more conservative policies. Support for the public sector in Scotland remains very strong; privatisation is driven by policies formulated in England.

By accentuating the role of the government to certify and protect e-identities, the Scottish approach aligns therefore at first sight well with the overall political landscape and a narrative of Scottish exceptionalism, which defines itself systematically also “against” the politics of London and the City.

5 “What’s done we partly may compute”

Thus viewed in its historical context, the latest proposals to further extend the coverage of the NHSCR can be seen as a logical extension of post-war Scottish (identity) politics: Where the 2009 proposal for the UK ID card had emphasised fear of crime, illegal immigration and the social problem of benefit cheats, the Scottish approach accentuates the positive role of the welfare state and the need of service delivery to the infirm. It follows the trajectory of the 1939 census described above and is unlike its abandoned UK predecessor essentially inclusive. It is not based on nationality but either residency or mere use of services. Unlike the UK ID proposal, no criminal sanctions are proposed – yet – for not carrying a correct ID, nor is the NHSCR database linked – yet – to biometric identifiers the way the 2009 proposal was.

However, this socially inclusive narrative hides the significant privacy concerns that the 2014 approach shares with the abandoned 2009 proposal. It also ignores that the question of centralised and persistent identifiers, as opposed to federated and temporal solutions, is orthogonal to the public sector - private sector dichotomy.¹⁷ This means that more privacy-friendly solutions that preserve the structural advantages of a federated “trusted third parties” model favoured by the UK Cabinet Office seem highly feasible, even with public sector governance.

Evaluated from this perspective, the concerns about the ID consultation are not (just) what the new enhanced system will disclose about citizens. Rather, it is the lack of detail about intended application, the lack of any recognition that while the extended database will not be a national ID system, it can easily be extended to become one, and given this, the choice of implementation and lack of parliamentary scrutiny. As the Information Commissioner in his response pointed out, not only is a Privacy Impact Assessment missing, the description of the intended applications remains so ill defined that a proper proportionality assessment will be difficult to carry out.

So how should we judge the proposal? Should we judge its proponents gently, the way Robert Burns, Scotland’s national poet urged us to judge each other in general, for “What’s done we partly may compute/ But know not what’s resisted”? Or should we

consider it as a disingenuous power grab by an administration and remember Burns’ words that “Some books are lies frae end to end”, and the government is often dominated by “chaps wha in a barn or byre Wad better fill’d their station”? The answer attempted here tries to find a third way. While the proposal raises serious concerns for privacy and also for the democratic process, these are not best understood as merely a cynical ploy. Rather, they are the result of long-term dynamics of UK political history. Some of these we encountered in the historical background narrative of the NHSCR. It left the UK with an “asymmetric” constitution, where each constituent part (England, Wales, Scotland and Northern Ireland) has different degrees of autonomy and responsibility. Underlying these are informal and contingent ways to understand and conceptualise what “national identity” means, a process where regional identities (Scottish, Irish, English) and federal (British) identity remain in constant flux and are constantly renegotiated. This creates inevitable tensions when the law is asked to “fixate” these identities through regulation.

This becomes particularly clear if we look at the fourth of the intended uses of the new system, to identify taxpayers liable to the new “Scottish” income tax. It is this new power of the Scottish executive, won in a complex political process, that ultimately forces the hand of the administration, or so we’ll argue. To understand this context, we once again have to look back in history.

On the 18th September 2014, Scotland voted with a 45-55 majority to remain in the UK. However, during a hard-fought campaign, where polls at one point had indicated a majority for exit, the Westminster government had already indicated a willingness to far-reaching concessions in the case of a No vote, and in particular substantially increased powers to vary income tax. These new powers are likely to come into law in 2015, and unlike its precursor powers, which were so limited to be harmful rather than a real option, the Scottish government is likely to make use of them. This however requires an infrastructure that allows the tax authorities to distinguish between Scots and non-Scots. This infrastructure however is not in place – the UK tax regime had no need to differentiate along the geographic boundaries of the nations that constitute the UK. The rate for UK income tax was uniform across the Kingdom, and since the Welsh and Northern Irish Assemblies do not have tax raising powers, and the English no separate parliament at all, there was also no need to co-ordinate centrally between separate regional income tax regimes.

In this asymmetric environment, no existing register or database matches exactly what the new tax rising regime in Edinburgh would demand – and for understandable historical reasons, as this would require the very debate which as we have seen was almost intentionally avoided through the centuries – what it means to have both a British and a regional-national identity. Rather, the relation of each kingdom within the UK with the central government grew ad-hoc, where shifting power balances created a unique set of rights and rules for each of them, with no centralised mechanism to resolve the resulting tensions.

In this power vacuum, administrative bodies and decision-makers can often operate outside the public gaze, and nowhere more so than when decisions can be framed as abstract questions of ICT technology. Many years ago, in my report on the state of e-governance in the UK for the International Congress on Comparative law, I described how in the informal practices of UK administration (which relies much more on conventions and “under-

¹⁶ <http://blogs.scotland.gov.uk/digital/2014/04/07/myaccount-signing-in-to-online-services/>

¹⁷ The author has to declare an interest at this point. I was consultant in a Cabinet Office study on e-identity for the UK, and also worked on a separate project with Police Scotland on a federated trusted third party approach that while in public service ownership, intentionally avoided a single persistent identifier system.

standings” than the comparatively legalistic and juridified system of continental Europe), government departments had been able to commandeer the e-governance agenda to push decisions that ought to have been subject to public debate and accountability into technological questions to be answered by software developers – after appropriate instruction by senior civil servants.¹⁸ A much more daring argument along similar lines had been suggested by Jon Agar in *The Government Machine*¹⁹, where he argued that the introduction of computers to control state action was indeed close to a revolution in the technical sense of “overthrowing the government”, led by civil servants and resulting in a new form of technocracy.

Of the rationales given for the extended new database, its use for tax administration is the most unexpected – previous attempts to create a national ID database in the UK had presented this either as “crime and terrorism prevention” or “entitlement cards”. In the analysis here, it is however the most important element, and we suspect the main driver behind the project. The referenda of 1996 and 2014 created a constitutional reality whose ramifications for everyday practice had never been properly planned. In such a situation, re-using what is available and bootstrapping on existing systems is a logical response. The critics of the proposed system are both right and wrong: yes, it has privacy implications that give rise to reasonable concerns, but not because of an attempt to introduce surveillance through the backdoor, but because it is an ad-hoc and unplanned response to needs created by the devolution referenda. The Information Commissioner is right in saying that ideally, such an important decision should come through parliament, and after proper political debate, but his analysis also underestimates what is at stake. The issue, ultimately, is not just if as a society we should have a system like the NHSCR, it is much more momentous than that – a national database needs to answer what it means to be part of that nation.

That question had played out in the cultural and political arena ever since the union in 1707 and was the ever present undercurrent in the referenda debates, but never crystallised into legal form. In 1996, the UK government had intentionally framed the discussion so as to avoid an open debate on Scottish identity when it opened up the franchise to all and only residents. In 2014, the SNP campaigned on an equally inclusive concept of citizenship, but its plans to translate this into a legal concept were rendered moot when the electorate rejected independence. This also prevented the creation of a national constitutional convention, and an open public debate about a rational form of constitutional arrangement for the UK. In this political and legal vacuum, the choice of the NHSCR as a de facto national database could be described as inspired. The inclusive concept of membership inherited from its foundation as part of the modern welfare state and the NHS aligns it well with the inclusive understanding of the franchise that informed not just the 20th century referenda, but is much older and deeper ingrained. Linking the use case for a national database to the question of taxation answers the question “who is Scottish” in a peculiar yet time honoured way: not by race, creed, or the accident of birth, but by the very material contribution to the collective good that one is willing to make.

¹⁸ Schafer, Burkhard. E-government in the United Kingdom. In: Prins, Corien (ed.) *Designing e-government*, Kluwer, 2007, pp. 165-183.

¹⁹ Agar, Jon. *The government machine: A revolutionary history of the computer*. Cambridge, MA: MIT Press, 2003.